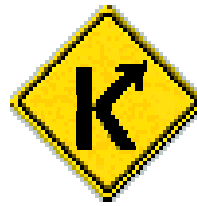




Federal Highway
Administration



Kentucky Transportation
Cabinet

Programmatic Agreement for Implementing Section 106 of the National Historic Preservation Act

Applicable to Federally Funded Transportation Projects in
the Commonwealth of Kentucky

The Kentucky Transportation Cabinet (KYTC) and the Federal Highway Administration (FHWA) have developed this programmatic agreement for the purposes of implementing Section 106 of the National Historic Preservation Act. Through the execution of this programmatic agreement the FHWA delegates the day-to-day Section 106 coordination to the KYTC. Delegation of responsibility may not be transferred to any other agency or party.

Coordination responsibilities with the State Historic Preservation Office (SHPO) are to be managed by the KYTC with the following exceptions:

- 1) Native American consultation shall be done by FHWA.
- 2) In the event of a dispute, regardless of the nature (designation of Area of Potential Effect, suitability of consulting parties, phased identification, eligibility, effect determinations) FHWA shall be involved in the resolution in accordance with the regulation.
- 3) FHWA is responsible for submittal of Memorandums of Agreement (MOA), Memorandums of Understanding (MOU) (as appropriate) and dispute resolution of eligibility and adverse effect determinations.

This agreement is not intended to create new regulatory or legal requirements. If at any time a signatory to this agreement determines that the intent of the Section 106 consultation process, as described in 36 CFR Part 800, is not being satisfied, it shall, in writing, notify the other parties to this agreement of their concerns. A conference between the parties to resolve these concerns shall be conducted at the earliest opportunity. If the concerns presented to the parties listed in this agreement cannot be resolved, this agreement will be null and void and the consultation process shall be conducted as set forth in the federal regulations.

STEP 1: Initiate the Process

A. *Establish that the activity is a Federal Undertaking*

1. An undertaking is defined as all projects that receive federal funds or require some form of federal permit or approval and have the potential to affect historic properties. Most federally funded highway projects are “undertakings” which require the Section 106 process be completed.
2. Section 106 does not apply to state-funded projects, unless a Federal permit or approval is required. In that situation, the Federal agency that is responsible for issuing the permit or approval will be the lead Federal agency for purposes of Section 106. For example, if the project was state-funded but required a Section 404 permit then the Corps of Engineers would be the lead Federal agency for Section 106 purposes.
3. On a biennial basis, KYTC will provide FHWA with the two-year list of transportation projects approved by the State Legislature along with a recommendation of undertakings, which may have a potential to affect historic properties.

j **Æ** FHWA/ KYTC DECISION POINT #1: “Undertaking”

FHWA/ KYTC shall concur on which projects in the two-year Transportation Plan may be “undertakings” requiring Section 106 consultation. (Per 36 CFR 800.16(y)).

4. FHWA shall send out the biennial list of identified undertakings that may require Section 106 consultation to the appropriate Native American tribes.

B. *Information Gathering*

1. Sufficient information shall be gathered to support a recommendation by KYTC and decision by FHWA as to whether the project has potential to cause effects.
2. During the planning stage of the project development process, KYTC shall inform the public and any project-specific citizen advisory committees of the Section 106 process and request their input on historic properties.
3. Where available, KYTC shall send the cultural resources overview to the State Historic Preservation Officer (SHPO) to establish early consultation.
4. KYTC staff members shall include the SHPO and FHWA in field trips as appropriate.

KÆ DECISION POINT #2: “Potential Effects”

KYTC shall decide whether (1) the project has no potential to cause effects or (2) the undertaking might affect historic properties. Documentation justifying the determination shall be maintained in the project file.

C. Initiate Consultation

1. Early in the project development process, KYTC shall advise the SHPO and FHWA that the Section 106 process has formally begun and request their input concerning consulting parties, Area of Potential Effect, and public involvement efforts.
2. Invitations to Consulting Parties
 - a. There are two types of consulting parties, 1) by-right consulting parties and 2) by-invitation consulting parties. The by-right consulting parties are legally entitled to participate as consulting parties. These parties include:
 - SHPO
 - THPO, if applicable
 - Federally-Recognized Native American tribes
 - FHWA
 - KYTC
 - Local Governments (if the project is within their jurisdiction)
 - National Park Service (if project is on Parklands or involves a National Historic Landmark)

The second types of consulting parties are those that participate by-invitation. These consulting parties may include:

- Individual citizens
- Local historic preservation organizations or interest groups
- Federal/State agencies with an interest in the project

By-invitation consulting parties must petition KYTC in writing to formally request to become a consulting party. In consultation with the SHPO, KYTC shall either approve or deny those requests. If at any time the KYTC chooses to deny a consulting parties request, FHWA must be notified. FHWA will then be responsible for informing the consulting party that there request was denied.

- b. KYTC shall invite all consulting parties, except Native American tribes. KYTC correspondence should utilize a standard letter.

- c. FHWA shall invite the appropriate Native American tribes to become a consulting party.

D. Public Notice

1. KYTC shall publish a notice in a local newspaper, or other appropriate means, to:

- Notify the public that the project has been initiated.
- Identify the selected consultant.
- Inform the public that the Section 106 process has begun and ask for the public's input.

This advertisement shall also include contact information and should be done concurrent with step C (1) of these procedures.

2. KYTC shall deliver a letter to all property owners notifying them of the project along with a discussion of the Section 106 process and how they can provide their input.

STEP 2: Identification of Historic Properties

A. Define the Area of Potential Effect (APE)

1. The APE is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effect is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” 36 CFR 800.16(d)
2. Throughout the early stages of the Section 106 process, the KYTC shall coordinate with the SHPO in determining an Area of Potential Effect.
3. FHWA shall be copied on all coordination letters between KYTC and the SHPO on issues involving Areas of Potential Effect.

I Æ DECISION POINT #3: “Area of Potential Effect”

KYTC shall make a final determination on the Area of Potential Effect in writing and send this to KYTC, SHPO, and FHWA. If the SHPO does not concur with the final determination made by KYTC, FHWA will review the APE and make the final determination.

B. Identification of Historic Properties in the APE

1. KYTC is required to make a “reasonable and good faith effort” to identify historic properties in the APE.
 - a. Historic Property means any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional and cultural importance to an Indian tribe or Native Hawaiian organization that meet the National Register criteria. Historic properties may include structures, places, archaeological sites, and cemeteries.
 - b. The reasonable and good faith efforts shall include:
 - 1) A review of existing information,
 - 2) Seeking the input of all consulting parties and the public, and
 - 3) Field investigations (these investigations shall be conducted in accordance with the SHPO’s “Specifications for Conducting Fieldwork and Preparing Cultural Resource Assessment Reports”).
2. *Identification and evaluation.* The following are normal everyday procedures to identify and evaluate historic properties:
 - a. EA/DEIS Archaeological Investigations
 - 1) When a preferred alternative will not be identified in the EA or DEIS, Phase 1 archaeological investigations will be conducted only on high probability areas for all alternatives being evaluated, unless otherwise agreed upon by FHWA and KYTC.
 - 2) When a preferred alternative will be identified in the EA or DEIS, Phase 1 archaeology investigations will be conducted for the entire preferred alignment and all high probability areas for all other alternatives being evaluated.
 - b. FONSI/ROD Archaeological Investigations
 - 1) If not completed prior to the approval of the EA/DEIS, a complete Phase I archaeological investigation shall be conducted on the selected alternative.

- 2) If the Phase I report recommends that Phase II investigations be conducted, then Phase II investigations and Native American coordination, as appropriate, will be completed prior to the approval of the FONSI/ROD.

The following are alternative procedures to identify and evaluate historic properties where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the KYTC and FHWA may defer final identification and evaluation of historic properties if it is specifically provided for in a Memorandum of Agreement (MOA) executed pursuant to 36 CFR 800.6.

- a. KYTC shall first make a reasonable and good faith effort to obtain permission and access the property. If permission cannot be obtained, these efforts shall be documented to the project file.
- b. In the event that the archaeological investigations are not completed prior to the FONSI/ROD approval, an MOA as described in Decision Point 5 on page 9 shall be executed.

C. Guidance for Determining High Probability Areas

To determine high probability areas for archaeological survey, background studies must be conducted on a project-by-project basis. This will minimally entail a review of archaeological records and reports, county atlases, and historic, topographic, geologic and soil maps. A variety of sources must be consulted; a single source should not be used.

High probability areas are defined as landforms where archaeological sites are likely to be located. This includes landforms that contain archaeological sites that have required or would potentially require evaluation for the National Register. This also includes both historic and prehistoric sites. Assistance in determining high probability areas can be found in *Guidelines For Local Surveys: A Basis For Preservation Planning* (National Register Bulletin 24, 1985).

These areas, together with the methodology and documentation used in making these determinations, will be submitted by KYTC to the Kentucky SHPO for concurrence and copied to FHWA. This must be done prior to initiating fieldwork.

An intensive Phase I survey must be conducted within all identified high probability areas unless otherwise agreed upon by the SHPO and KYTC. In instances where a Phase I level of survey will not be proposed for all high probability areas, FHWA shall be consulted prior to initiating field activities. The survey shall include a determination of site boundaries and a statement of potential eligibility for the National Register of Historic Places. These findings will be submitted to the Kentucky SHPO for concurrence.

Once a preferred alignment is selected, a complete intensive Phase I survey will be conducted on all previously un-surveyed areas within the alignment.

D. Late Discoveries

1. Appropriate steps shall be taken to minimize or mitigate any transportation impacts to the “find” with the provisions of 36 CFR 800.13. In case of a late archaeological discovery or evidence of prehistoric human remains, all project work in the vicinity of the discovery area shall cease immediately. The area shall be secured and protected. A full assessment of the “find” and the level of its cultural significance will be made. If the “find” involves prehistoric artifacts or human remains, communications with the appropriate consulting parties shall be re-initiated.
2. Confidential information concerning the late discovery shall be handled according to 36 CFR 800.6 (a) (5).

mÆ DECISION POINT #4: “Eligibility” and “Effect Determination”

KYTC shall send appropriate eligibility and effect documentation (per 36CFR 800.11) to the SHPO. This documentation must include 1) a finding of no historic properties present or a finding of historic properties present. If historic properties are present, the documentation shall also include 2) a finding that no historic properties are adversely effected or a finding that historic properties are adversely effected.

For project studies that recommend the site(s) is eligible and has an adverse effect for any alternative, a transmittal letter will be submitted to FHWA from KYTC with the following information:

- Site name or identification
- Location of site
- Eligibility and effect recommendations for each alternative

Depending on the size and complexity of the project, eligibility and effect determinations may not be able to be issued simultaneously. In cases where this occurs, KYTC will submit separate eligibility and effect documentation to the SHPO.

If the SHPO agrees with the recommendation made by KYTC, the same documentation package shall be sent to all consulting parties via certified mail with return receipts.

The SHPO and all other consulting parties shall have 30 days from the receipt of the notification to comment on the eligibility and effect determinations. If the SHPO does not respond within 30 days, KYTC shall confirm SHPO receipt of the

information before assuming concurrence. If any consulting party disagrees within the 30-day review period, FHWA must either consult with that party and resolve the disagreement or refer the matter to the Keeper of the National Register for resolution of eligibility determinations or the ACHP when adverse effect resolution is warranted. The ACHP will have 15 days to make a determination. If the ACHP does not reply within 15 days, their concurrence with FHWA is assumed.

(The Keeper of the National Register is responsible for making the eligibility determination to resolve a disagreement. The Advisory Council resolves disagreements involving adverse effects.)

If the SHPO does not agree with KYTC's recommendation on eligibility status, FHWA shall be brought in to review the documentation and make an eligibility determination. If the SHPO and FHWA cannot agree on the eligibility status of a property, FHWA shall send a request for eligibility determination to the Keeper of the National Register of Historic Places. The Keeper's determination is binding.

Assessment of Adverse Effects

- a. Criteria of Adverse Effect (per 36CFR 800.5(a)(1)):
 - The project may alter, directly or indirectly, the characteristics that qualify the property for inclusion on the National Register, and/ or
 - The project may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association.

In cases where the SHPO and FHWA disagree on effect determinations, FHWA shall forward the matter to the Advisory Council on Historic Preservation. Once again, the ACHP shall have 15 days to make a determination. If the ACHP does not reply within 15 days, their concurrence with FHWA is assumed.

Per Section 304 of the National Historic Preservation Act and Section 9(a) of the Archaeological Resources Protection Act, specific archaeological site locations shall not be included in documentation made available to the general public. This will minimize the potential for endangerment of sites from vandalism or theft.

STEP 3: Resolution of Adverse Effects

- a. KYTC and FHWA shall work with the SHPO and appropriate consulting parties (including Native American tribes if appropriate) to resolve any adverse effects on historic properties. Resolution will involve avoidance, minimization, and/ or mitigation of adverse effects to historic properties.
- b. Measures to resolve the adverse effects shall be outlined in a Memorandum of Agreement (MOA), which concludes the Section 106 process.

nÆ *FHWA/ KYTC DECISION POINT #6: “Memorandum of Agreement”*

The MOA:

- Shall be consistent with the format developed by FHWA, KYTC, and SHPO;
- Shall be drafted by KYTC;
- Shall be as specific as possible in terms of avoidance, minimization, and mitigation measures;
- May be reviewed by KYTC legal counsel if the MOA is unique or complex;
- Shall give all parties with implementation responsibilities the opportunity to be signatories. If those parties choose not to sign the MOA the process may proceed;
- Where the phasing of archaeological work has not been completed, the conditions of the Memorandum of Understanding shall be incorporated by reference in the MOA;
- The MOA must be signed by FHWA, SHPO, KYTC and any Tribes, if participating; and
- Shall be signed before the FONSI or ROD is approved by FHWA;
- Shall be sent to ACHP by FHWA.

FEDERAL HIGHWAY ADMINISTRATION

Jose Sepulveda, Kentucky Division Administrator

Date

KENTUCKY TRANSPORTATION CABINET

James C. Codell III, Secretary

Date

STATE HISTORIC PRESERVATION OFFICE

David L. Morgan, Director

Date

ADVISORY COUNCIL FOR HISTORIC PRESERVATION

Date